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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SILVERLEAF RESORTS, INC., AND
SILVERLEAF CLUB,

Petitioners,

v.

LE ANN MCATEER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), as construed by this Court in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), and its related precedents, completely preempts common law negligence claims by ERISA plan participants or beneficiaries who, after being denied benefits under an on-the-job injury plan, assert that an employer negligently failed to maintain a safe workplace.

RULE 29.6 STATEMENT

Petitioner Silverleaf Resorts, Inc. is a publicly held company. Petitioner Silverleaf Club is a non-profit corporation affiliated with Silverleaf Resorts, Inc. No parent or publicly held company owns more than 10 percent of either Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Silverleaf Resorts, Inc. and Silverleaf Club (collectively "Silverleaf") respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated January 15, 2008, is officially reported at 514 F.3d. 411, and is reproduced in the Appendix, *infra*, at A-1 to A-13. The opinion and order of the United States District Court for the Eastern District of Texas, Tyler Division, dated May 1, 2006, denying respondent's motion to remand is unreported and is set forth in the Appendix, *infra*, at A-15 to A-26. The United States District Court for the Eastern District of Texas, Tyler Division, subsequently entered an opinion and order on November 20, 2006, compelling arbitration and dismissing the original petition with prejudice. The November 20, 2006 order is also unreported and is set forth in the Appendix, *infra*, at A-38 to A-39. An order directing final judgment was also filed November 20, 2006, and is set forth in the Appendix, *infra*, at A-40.

JURISDICTION

The district court had federal jurisdiction over the plaintiff's claims pursuant to 28 U.S.C. § 1331 and the complete preemption effected by 29 U.S.C. § 1132. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on January 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 29 U.S.C. §§ 1144(a) and 1132(a), (ERISA §§ 514(a) and 502(a)), of the Employee Retirement Income Security Act ("ERISA") and are set forth in the Appendix, *infra*, at A-41 to A-47 and A-48 to A-60.

STATEMENT OF THE CASE

1. Petitioners Silverleaf Resorts, Inc.[1] and Silverleaf Club (for convenience hereinafter collectively "Silverleaf") provide benefits to their employees through the Silverleaf Club Employee Injury Benefit Plan (the "Plan"), which is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. The Plan provides no-fault benefits to employees in the event of a job-related injury and requires arbitration of any disputes regarding benefits. Silverleaf is a non-subscriber to Texas workers' compensation insurance.

2. Respondent Le Ann McAteer ("McAteer") was employed by Silverleaf Club as a landscaper from August 19, 2004 to August 2, 2005. McAteer enrolled in the Plan, which contained a provision, that McAteer agreed to in writing, that the Plan would provide the exclusive avenue of relief for on-the-job injuries. McAteer claims she suffered a job-related injury on July 11, 2005, when she tripped over a parking stop while using a 'weedeater' in a parking lot. McAteer did not report the injury to the Plan Administrator until September 2005, after her employment with Silverleaf had ended. In October 2005, McAteer

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[1] Silverleaf Resorts, Inc. provides certain administrative and human resource services to Silverleaf Club. Silverleaf Club was McAteer's employer.

submitted an injury claim form to the Plan. The Plan administrator denied McAteer's claim because McAteer did not timely report her injury, did not seek pre-approval for her treatment, and did not use a Plan-approved physician. The initial determination contained a notice of appeal rights, but McAteer did not pursue an administrative appeal, nor did she seek relief under Section 502 of ERISA, which entitles an ERISA plan participant or beneficiary to bring an action "to recover benefits due to him under the terms of his plan" or "to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (ERISA § 502(a)(1)(B)).

3. Instead, on January 19, 2006, McAteer filed an original petition in Texas state court asserting a common law negligence claim alleging Silverleaf was negligent in failing to provide a safe work place. (App., *infra* at A-61 to A-65). Silverleaf timely removed the action to the U.S. District Court for the Eastern District of Texas, Tyler Division, asserting that McAteer's claims were completely preempted by ERISA and thus removable under 28 U.S.C. § 1331, 29 U.S.C. § 1132, and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-66 (1987) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). (App., *infra*, at A-66 to A-69). McAteer moved to remand, claiming she was not seeking ERISA benefits, but merely asserting a common law negligence claim against an employer who chose not to subscribe to workers' compensation insurance for its

employees.

4. On May 1, 2006, the district court held that under *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), McAteer's claims must be re-characterized as stating federal questions under ERISA:

> [T]he mere fact that [McAteer's] state cause of action attempts to authorize remedies beyond those authorized by ERISA § 502(a) does not put the cause of action outside the scope of the ERISA civil enforcement mechanism. . . . The question presented to this Court, after *Davila*, is whether McAteer states violations of legal duties that arise independently of ERISA or the terms of the employee benefit plan at issue . . . Because McAteer voluntarily enrolled in the Plan, her subsequent on-the-job injury claims are thus subject to the Plan she enrolled in. Because the rights and obligations of the parties are defined by reference to the ERISA-regulated plan, Plaintiff cannot establish an independent legal duty. Even giving deference to the well-pleaded complaint rule, the court doesn't have to look far to determine that the plaintiff's characterization of her claims involves a substantial issue that Congress has deemed to be within the province of the federal judiciary.
>
> Plaintiff seeks redress for her on-the-job

> injury. . . .[T]he Plan provides the exclusive claims-handling procedure for benefit claims, and because her on-the-job injury claims directly relate to and are covered by the terms of the ERISA employee welfare benefit plan which she voluntarily enrolled in, the Court finds that Silverleaf did not owe McAteer a legal duty independent from obligations under the ERISA Plan. Accordingly, the Court finds McAteer's claims are completely preempted by ERISA.

The district court acknowledged that, prior to *Davila*, Fifth Circuit precedent held that ERISA did not preempt state law negligence claims under *Hook v. Morrison Milling Co.*, 38 F.3d 776, 781 (5th Cir. 1994). The court ultimately determined that *Davila* undermined *Hook* and required courts to look past any "tort" label affixed to a plaintiff's claim in an effort to circumvent the preemptive scope of ERISA.

5. On August 11, 2006, after the district court denied McAteer's motion to remand, McAteer filed a First Amended Complaint asserting a claim for benefits under ERISA. (App., *infra*, at A-70 to A-75). On November 20, 2006, the district court granted Silverleaf's motion to compel arbitration and dismissed McAteer's claims with prejudice. (App., *infra*, at A-38 to A-39). McAteer appealed to the U.S. Court of Appeals for the Fifth Circuit.

6. A panel of the Fifth Circuit reversed. (App.,

infra, at A-1 to A-14). The court recognized that federal courts have removal jurisdiction over state-law claims that are completely preempted by ERISA. The Fifth Circuit determined, however, that under *Hook*, state law negligence claims for failing to maintain a safe workplace are not preempted by ERISA, even if an employee signs a waiver of such claims in order to participate in an ERISA plan. In reaching its decision, the court first proposed to address whether McAteer's negligence claim "relates to" the Plan for purposes of ERISA preemption under § 514(a), by asking (1) whether the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) whether the claims directly affect the relationship among the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries, citing *Woods v. Texas Aggregates, LLC*, 459 F.3d 600, 602 (5th Cir. 2006). But the court did not actually address these elements. Rather, the court simply stated that it previously considered these questions in *Hook* and concluded there that ERISA did not preempt a plaintiff's negligence claims. In *Hook*, a split panel of the Fifth Circuit held that negligence claims were not preempted under § 514(a) of ERISA because such claims were "totally independent from the existence and administration of [the employer's] ERISA plan," even where the ERISA plan included a waiver provision of the right to sue for damages following

on-the-job injuries. *Hook*, 38 F.3d at 784. The *Hook* court also determined that such negligence claims did not affect the administrator-beneficiary relationship, only the employer-employee relationship. *Id.* at 783. Finally, the *Hook* court found the fact that the employee waived her claims as part of her enrollment in the ERISA plan to be inconsequential, stating that to hold otherwise would turn ERISA preemption analysis "on its head" because employers would be able to avoid any state law simply by referring to that law in its ERISA plan. *Id.* at 785. The *Hook* court did not analyze the negligence claim under § 502(a).

7. Having concluded that McAteer's negligence claims are not preempted by ERISA § 514(a), the Fifth Circuit finally addressed this Court's decision in *Davila* and Silverleaf's argument that *Hook* was no longer good law in light of *Davila*. In *Davila*, this Court stated a cause of action was completely preempted "if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions." 542 U.S. at 210. Although the Fifth Circuit essentially conceded that McAteer could have brought her claim under ERISA § 502(a)(1)(B), its analysis went no further. The court merely reiterated that it had already determined that state law negligence claims were independent of the ERISA plan under *Hook*, and that therefore, even under *Davila*, McAteer's

claims are not preempted by ERISA. The Fifth Circuit failed to address McAteer's claims in light of the broad preemptive scope of § 502(a) and the exclusive remedies set forth therein.[2]

8. The Fifth Circuit noted that it has continued to apply *Hook* even after this Court's decision in *Davila*, citing *Woods v. Texas Aggregates, LLC*, 459 F.3d 600 (5th Cir. 2006).

9. Because the Fifth Circuit concluded that McAteer's negligence claims were not completely preempted by ERISA and thus did not arise under federal law as necessary to confer removal jurisdiction, the court reversed the denial of McAteer's remand motion.[3] (App., *infra*, at A-12).

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[2] The Fifth Circuit's error is compounded by its failure to address the issues in the correct order. Section 502(a) confers federal court jurisdiction and should be addressed before an analysis under § 514. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998) (jurisdiction must be established as threshold matter); *see also Davila*, 542 U.S. at 209 (stating § 502(a)(1)(B) confers federal jurisdiction); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6-8 (2003)(discussing same); *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003)(holding only complete preemption under § 502(a) is required for removal jurisdiction; conflict preemption under § 514 is not required and overruling caselaw to the contrary).

[3] The Fifth Circuit first determined that McAteer's appeal was not moot after she amended her complaint to include an ERISA claim following the denial by the district court of her motion to remand. 514 F.3d at 415-16. Silverleaf argued that McAteer's appeal was moot because she voluntarily created federal jurisdiction when she amended her complaint. *See Whitcomb v. Smithson*, 175 U.S. 635 (1900) (removal improper where defendants removed case to federal court after directed verdict in state court was ordered in favor of

REASONS FOR GRANTING THE PETITION

By continuing to follow the split panel decision in *Hook v. Morrison Milling Co.*, 38 F.3d 776 (5th Cir. 1994), the Fifth Circuit has created a string of cases concerning an important federal question that is in direct conflict with this Court's decision in *Davila* and its predecessors. The decision below, if allowed to stand, will undermine this Court's long-standing jurisprudence regarding the broad scope of ERISA's pre-emptive force and the clear congressional intent of Section 502(a) to make the remedies enumerated there exclusive.

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non-diverse defendant because dismissal of non-diverse defendant was not a voluntary act of plaintiff); *Powers v. Chesapeake & O. Ry.*, 169 U.S. 92 (1898) (removal was proper where action originally did not involve completely diverse parties, but plaintiff voluntarily dismissed non-diverse defendant). The Fifth Circuit did not address the voluntary-involuntary rule, but rather based its decision solely on the waiver doctrine and *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996) and *Waste Control Specialists, LLC v. Envirocare of Tex., Inc.*, 199 F.3d 781 (5th Cir), *op. withdrawn and superseded in part*, 207 F.3d 225 (5th Cir. 2000). It is Petitioner's position that the Fifth Circuit erred in resolving the issue solely under the wavier doctrine and should have also considered the voluntary-involuntary rule. *See Waste Control*, 199 F.3d at 787 n.5 (holding plaintiff did not waive jurisdictional argument by amending complaint after finding merit in plaintiff's argument that complaint was only narrowly amended in contrast to amended complaint in *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 5th Cir. 1990), wherein plaintiff voluntarily amended complaint following removal to include ERISA cause of action—as McAteer did in the instant action—and Fifth Circuit ultimately determined plaintiff *had* waived objection to removal after motion for remand was denied).

Section 502(a) was intended to be the exclusive vehicle for challenging a determination of a claim for benefits. By allowing plaintiff's negligence claim to go forward, the Fifth Circuit's decision in *McAteer* expands the exclusive remedies set forth in § 502(a), something this Court has repeatedly affirmed cannot be done. *See e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (state law cannot "expand[] the potential scope of ultimate liability imposed upon employers by the ERISA scheme"); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 145 (1990) (holding "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek . . . benefits"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (holding § 502(a) is exclusive remedy for rights guaranteed under ERISA); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-3 (1987) (holding any state cause of action that duplicates, supplements or supplants the civil enforcement remedies of ERISA is completely preempted). Further, as in *Pilot Life*, the *McAteer* decision impermissibly interferes with the administration of benefits under an ERISA plan. Any statutory or common law that provides a forum of ultimate relief in a judicial forum that adds to the remedies provided by ERISA "patently violates ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct" and a uniform regime of remedial orders and awards when a violation has occurred. *Rush Prudential*, 536 U.S. at 379.

McAteer cannot be reconciled with this Court's unbroken precedents holding that the rights of action under Section 502(a) are exclusive and that any cause of action that purports to provide an alternative remedy to those delineated in section 502(a) are necessarily preempted. *Ingersoll-Rand*, 498 U.S. at 144-45; *Metro. Life*, 481 U.S. at 64-7; *Davila*, 542 U.S. at 216. The Court should grant certiorari to address the Fifth Circuit's continuing divergence from and conflict with decisions of this Court.

I. THE FIFTH CIRCUIT'S DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S WELL-ESTABLISHED PRECEDENTS REGARDING ERISA PREEMPTION.

ERISA is a comprehensive and "carefully integrated" statute that sets out an exclusive, nationally uniform framework for regulating the administration of employee benefit plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990). To accomplish this purpose, "ERISA includes expansive pre-emption provisions . . . which are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'" *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208 (2004) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Foremost among these pre-emption provisions are sections 514(a) and 502(a)(1)(B). Section 514(a), "conspicuous for its breadth," states:

> Except as provided in subsection (b) of

> this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Ingersoll-Rand, 498 U.S. at 138 (quoting 29 U.S.C. § 1144(a) (emphasis added)). This Court has consistently held that Congress used the words 'relate to' in their broadest sense, "rejecting more limited pre-emption language that would have made the clause applicable only to state laws[4] relating to the specific subjects covered by ERISA." *Id.* Indeed, "a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Id.*, 498 U.S. at 139 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 47 (1987)). The purpose of section 514(a) is to "ensure that plans and plan sponsors would be subject to a uniform body of benefits law." *Id.* at 142. Preemption under § 514(a), however, does not confer federal jurisdiction. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987).

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[4] "State laws" are defined to include "all laws, decisions, rules, regulations or other State action having the effect of law." 29 U.S.C. § 1144(c)(1)(ERISA § 514(c)(1)). Thus, common law tort claims are subject to pre-emption. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-9 (1987) (unanimously holding that ERISA completely preempted tort claims).

Section 502(a), which provides "six carefully integrated" and exclusive civil enforcement provisions, is equally, if not broader in its preemptive effect than section 514(a). *Pilot Life*, 481 U.S. at 54-6 (stating § 502(a) was modeled after § 301 of the Labor Management Relations Act of 1947 ("LMRA"), which "pre-emptive force [is]. . . so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization"). Indeed, the civil enforcement provisions of § 502(a) "are of such extraordinarily preemptive power that they override even the 'well-pleaded complaint' rule for establishing the conditions under which a cause of action may be removed to a federal forum." *Rush Prudential*, 536 U.S. at 376. Under § 502(a)(1)(B), a participant or beneficiary may bring a federal civil action "to recover benefits due under the terms of [the] plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." § 502(a)(1)(B), (29 U.S.C. § 1132(a)(1)(B)). This Court has steadfastly held that § 502(a) provides the exclusive remedies for civil enforcement of rights guaranteed under ERISA, and that the congressional policy choices reflected in the purposeful inclusion and exclusion of certain remedies would be "completely undermined if ERISA participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Ingersoll-Rand*, 498 U.S. at 144; *Pilot Life*, 481 U.S. at 54.

More than twenty years ago in *Pilot Life*, this Court first confirmed the exclusivity of § 502(a) and

the impermissibility of State attempts to supplement the remedies set forth therein. In *Pilot Life*, an employee instituted a diversity action alleging common law tort claims against an insurer that terminated his disability benefits purportedly guaranteed under an ERISA plan. 481 U.S. at 43. Granting summary judgment in favor of the employer, the district court determined that all of the employee's claims were preempted by ERISA. *Id.* at 44. On appeal, the Fifth Circuit held, as in this case, that the employee's tort actions were not preempted by ERISA. *Id.* This Court reversed the Fifth Circuit's decision, unanimously rejecting the employee's argument that his tort claims were exempt from preemption as a permissible regulation of insurance under the saving clause in ERISA. *Id.* at 57. This Court reached its conclusion after careful examination of the legislative history of ERISA and the civil enforcement scheme enumerated in § 502(a).

As this Court acknowledged in *Pilot Life*, the legislative history of ERISA demonstrates that the preemptive force of § 502(a) was modeled after § 301 of the LMRA, arguably the broadest preemptive clause in the history of federal statutes. *Id.* at 54-6. "Congress's specific reference to § 301 of the LMRA to describe the civil enforcement scheme of ERISA . . . would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws." *Id.* at 56; *see Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987) (holding tort claim was not sufficiently independent of collective-

bargaining agreement to withstand pre-emptive force of § 301). Indeed, Congress's "intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim." *Davila*, 542 U.S. at 216.

This Court also recognized in *Pilot Life* that the structural integrity of ERISA depends upon the exclusivity of the enforcement remedies in § 502(a):

> the detailed provision of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'

Pilot Life, 481 U.S. at 54 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)(emphasis and alteration in original)). In holding the employee's tort claims preempted, the Court observed that the availability of punitive damages under state law for a common law tort claim was inconsistent with the exclusive equitable relief afforded under § 502(a). *Pilot Life*, 481 U.S. at 53-54.

In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-7 (1987), decided on the same day as *Pilot Life*, this Court unanimously held that the preemptive power of § 502(a) was sufficient to confer federal jurisdiction over a former employee's common law contract and tort claims, even where, as in *McAteer*, the original petition purported to raise only state law causes of action. In *Metropolitan Life*, an employee asserted that he was disabled and when his disability insurer denied his claim for benefits, the employee sued in state court, asserting only common law contract and tort claims.[5] 481 U.S. at 61-2. After defendants successfully removed the action to federal court, the district court granted summary judgment on the merits in favor of defendants. *Id.* The court of appeals reversed on the basis that the district court lacked removal jurisdiction. *Id.* at 62. This Court

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[5] The employee in *Metropolitan Life* sought compensatory damages for breach of contract, mental anguish, wrongful termination of employment, and wrongful failure to promote in retaliation of a workers' compensation claim. *Metro. Life*, 481 U.S. at 61. This Court found all of the employee's contract and tort claims preempted by § 502(a)(1)(B). *Id.* at 67.

unanimously reversed the circuit court, holding that *Pilot Life*, decided the same day, had firmly established that "a suit by a beneficiary to recover benefits from a covered plan" inescapably "falls directly under § 502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes." *Id.* at 62-63 (citing *Pilot Life*, 481 U.S. at 56). This Court, therefore, concluded that the employee's claims, which sought both an award of benefits and damages arising from the denial of benefits, were preempted.

Metropolitan Life and *Pilot Life* together confirm, in concert with the structure and legislative history of ERISA—and Congress's specific reference to § 301 of the LMRA to describe the civil enforcement scheme of ERISA—that Congress intended the exclusive remedies provided by § 502(a) to displace state causes of action that seek to supplement or vary the remedies available under § 502(a). Accordingly, state law causes of action that fall within the scope of § 502(a), no matter how artfully plead, are "necessarily federal in character" and sufficient to confer federal jurisdiction. *Pilot Life*, 481 U.S. at 56-7; *Metro. Life*, 481 U.S. at 64-7. Allowing States to depart from or vary the remedial scheme to allow state law claims for damages following denial of ERISA plan benefits, is in contravention of the congressional purpose and preemptive scope of ERISA.

Additionally, both *Metropolitan Life* and *Pilot Life* make clear that common law tort claims enjoy no exemption from complete preemption under § 502(a).

In both cases, the Court unanimously held that ERISA completely preempted common law tort claims. *Pilot Life*, 481 U.S. at 48-9; *Metro. Life*, 481 U.S. at 61-2. The rule announced in *Hook* and followed by the Fifth Circuit in *McAteer*, that Texas state law negligence claims are categorically exempt from complete preemption, cannot coexist with the holdings in *Metropolitan Life, Pilot Life* or *Davila*. Such a rule interferes with (and therefore "relates to") the administration of benefits under an ERISA plan by supplementing the exclusive civil remedies set forth in § 502(a) and thereby impermissibly "expand[ing] the potential scope of ultimate liability imposed upon employers by the ERISA scheme." *Rush Prudential*, 536 U.S. at 379. In so doing, the rule in *Hook* and *McAteer* frustrates the congressional purpose of ERISA: to encourage employers to offer benefits to employees by assuring a predictable set of liabilities employers may rely upon. *Id.* If all ERISA plan participants and/or beneficiaries sought extra-plan compensation as redress for their injuries, then employers could not afford to provide benefit plans. *See Hook v. Morrison Milling Co.*, 38 F.3d 776, 787 (5th Cir. 1994) (Jones, J. dissenting).

This Court has never departed from—and indeed has repeatedly reaffirmed—the analysis it adopted in *Metropolitan Life* and *Pilot Life*. For example, in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), an employee alleged that he had been wrongfully terminated to prevent his pension benefits from vesting. The employee filed suit in

Texas state court, asserting a cause of action for wrongful discharge and breach of contract, alleging that his employer had tortiously violated the common law duty of good faith and fair dealing in connection with the employment relationship. *See McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 69-70 (Tex. 1989) *rev'd*, 498 U.S. 133 (1990). The Texas Supreme Court permitted the action to proceed, noting—as did the Fifth Circuit in *McAteer*—that the plaintiff was not seeking the recovery of ERISA plan benefits, but common law compensatory damages in the form of lost future wages and mental anguish, in addition to punitive damages. *Id.* at 71 n.3.

This Court unanimously concluded that the employee's common law claims were completely preempted by § 502(a), regardless of the tort cloak surrounding plaintiff's claims. *Ingersoll-Rand*, 498 U.S. at 144-45. Because the employee's right to benefits was guaranteed by ERISA, this Court concluded that his exclusive avenue of redress was § 502(a). *Id.* at 145. It did not matter that the employee's claims sought relief in tort and contract damages rather than in the equitable recovery of pension benefits that ERISA affords, because the conflict was with the exclusivity of the ERISA remedies available in § 502(a). *Id.*

More recently, in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), this Court again unanimously reaffirmed the broad preemptive scope of § 502(a), holding that "any state law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear

congressional intent to make ERISA remedies exclusive and is therefore preempted." 542 U.S. at 209.

In *Davila*, (a consolidated action arising in the Fifth Circuit), two individuals, following the denial of certain plan benefits, asserted tort claims in state court against their respective ERISA plan administrators pursuant to a Texas state law. 542 U.S. at 204. Following removal and preemption under § 502(a), plaintiffs declined to amend their complaints to bring explicit ERISA claims and the district courts dismissed both complaints with prejudice. *Id.* The Fifth Circuit reversed the district court on the basis that plaintiffs asserted tort claims arising from a statutorily imposed duty of care independent of ERISA, and because plaintiffs did not seek reimbursement for benefits denied them. *Id.*

This Court unanimously reversed the Fifth Circuit, holding that plaintiffs' tort claims were preempted by § 502(a)(1)(B) and were therefore removable to federal court. 542 U.S. 221. As in *Ingersoll-Rand*, the fact that plaintiffs were asserting tort claims, and that they were not seeking reimbursement for benefits denied to them, was not controlling; otherwise, the Court reasoned, preemption would depend on the label attached to a particular theory. *Id.* at 214. "The limited remedies available under ERISA are an inherent part of the 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Id.* at 215 (citing *Pilot Life*, 418 U.S. at 55).

As *Davila*, *Ingersoll-Rand*, and this Court's other precedents make clear, there is no basis in the language and legislative history of § 502(a) for limiting removal of state actions to only those which expressly seek recovery of plan benefits. *See Davila*, 542 U.S. at 214 (allowing label affixed to claim to control would impermissibly allow parties to evade preemptive scope of ERISA); *Ingersoll-Rand*, 498 U.S. at 145 (stating "it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits"). This is because the civil enforcement provisions of § 502(a) "are of such extraordinarily preemptive power" that they supersede any attempts by artful drafting of claims that seek to evade the exclusively federal remedial scheme set forth therein. *Rush Prudential*, 536 U.S. at 376.

The Fifth Circuit's decision in *McAteer* is contrary to this Court's precedents. By summarily relying on its panel decision in *Hook*—that negligence claims are independent of ERISA *under § 514(a)* and therefore are not preempted—the Fifth Circuit failed to appropriately consider *Davila* and this Court's long-standing jurisprudence regarding the exclusivity of the remedial scheme and preemptive scope of § 502(a) on McAteer's claims. *McAteer*, 542 U.S. at 418 (App., *infra*, at page A-10 to A-12). While the Fifth Circuit acknowledged this Court's instruction in *Davila* that "ERISA need not strictly duplicate a state law cause of action in order for the state law to be preempted," the court simply concluded that because it had "already determined [in *Hook*, decided

prior to *Davila*] that state law negligence claims for failing to maintain a safe workplace are independent of ERISA, . . .th[en] even under *Davila*, McAteer's claims are not completely preempted by ERISA." 514 F.3d at 418 (citing *Davila*, 542 U.S. at 214-16) (App., *infra*, at page A-12). The flaw in the Fifth Circuit's reasoning is that *Hook* remains good law even after this Court's decision in *Davila*.

Directly contrary to this Court's teaching in *Pilot Life* and its progeny, the Fifth Circuit failed—as it did previously in *Davila*—to look beyond the label of McAteer's claims and to scrutinize the claims for what they are: redress for an alleged on-the-job injury and therefore subject to the ERISA plan in which she enrolled. *See Metro. Life*, 481 U.S. at 64-7 (concluding preemptive force of § 502(a)(1)(B) includes exception to well-pleaded complaint rule); *Davila* (stating Fifth Circuit erroneously focused on label affixed to claim rather than substance of claim). As this Court counseled the Fifth Circuit in *Davila*:

> Distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA simply 'by relabeling their . . . claims' . . . Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted,

> even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim.

Davila, 542 U.S. at 214 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)).

Further, the reliance on *Hook* as a basis for determining whether claims are completely preempted so as to confer federal jurisdiction is misplaced. Nowhere in *Hook* does the Fifth Circuit address the preemptive scope and exclusive remedies of § 502(a); the court only considered the preemptive reach of § 514(a), which does not confer federal jurisdiction.[6] *See Hook*, 38 F.3d 780-86; *Davila*, 542 U.S. at 209 (stating § 502(a) confers federal jurisdiction). Accordingly, by continuing to apply *Hook* to hold that a plaintiff's common law tort claims that seek extra-plan recovery are *not* completely preempted, the Fifth Circuit violates the uniformity of redress mandated by § 502(a) and undermines the congressional purpose of ERISA. As this Court has emphasized repeatedly, the purpose of ERISA is to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential*, 536 U.S. at 379. The

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[6] Subject matter jurisdiction was determined to exist based on a wrongful discharge claim asserted by the plaintiff, a claim, ironically, that the court recharacterized as a claim under section 510 of ERISA. *Hook*, 38 F.3d at 776.

McAteer decision, as well as other Fifth Circuit and district court decisions[7] decided after *Davila*, impermissibly interfere with the administration of benefits under an ERISA plan by providing extra-plan recovery in the form of a legal damages remedy.

For example, in *Woods v. Texas Aggregates, L.L.C.*, the Fifth Circuit held that ERISA did not preempt a common law negligence claim brought following an on-the-job injury because the negligence claim did not "relate to" the employer's ERISA plan as analyzed under *Hook*. Weeds, 459 F.3d 600 (5th Cir. 2006). As in *McAteer*, the Fifth Circuit concluded that because the plaintiff's claim "seeks only damages . . . for alleged negligent maintenance of [the] workplace," the claim was not preempted by ERISA § 514(a). *Woods*, 459 F.3d at 603. That 'damages' might also be available in the form of plan benefits—i.e., that the common law compensatory damages duplicated plan benefits—and that plaintiff could have brought a claim pursuant to § 502(a)(1)(B), was immaterial to the court's decision. *Id.*

The Fifth's Circuit's decisions in *McAteer*, *Woods*, and *Hook* disrupt ERISA's exclusive regulatory scheme and are incompatible with this

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[7] For instance, in *Portillo v. Convalescent Enters., Inc.*, No. EP-05-CA-276-PRM, 2005 WL 1796146 (W.D. Tex. July 28, 2005), the district court determined that § 502(a) did not preempt an employee's common law negligence claim arising from an on-the-job injury despite the existence of an ERISA plan that provided benefits for such injuries. The *Portillo* court, like the Fifth Circuit, relied primarily on *Hook* and other decisions decided before this Court's decision in *Davila*.

Court's governing precedents, and are grounds for this Court's intervention. This would not be the first time this Court has admonished the Fifth Circuit. As recently as *Davila*, the Court rejected the Fifth Circuit's preemption analysis, stating, "[t]he Court of Appeals came to a contrary conclusion for several reasons, all of them erroneous." *Davila*, 542 U.S. at 214. The Fifth Circuit's preemption analysis hasn't changed, despite this Court's holding in *Davila*.

II. INTERVENTION BY THIS COURT IS NECESSARY TO CORRECT THE FIFTH CIRCUIT'S DIVERGENCE FROM AND DISREGARD OF THIS COURT'S PRECEDENTS.

From *Pilot Life* through *Davila*, the Court's decisions have consistently adhered to a set of three core principles.[8] First, the remedial provisions of ERISA are exclusive because Congress carefully weighed which rights of action to include and which to omit, and therefore any right of action *not* included must be deemed to have been *excluded*. *Pilot Life*, 481 U.S. at 54; *see Rush Prudential*, 536 U.S. at 378-79; *Ingersoll-Rand*, 498 U.S. at 144-45. Second, the policy choice embodied in the "carefully balanced" set of remedies of § 502(a) is binding on the States, which may not add to, subtract from, or vary any of these rights of action. Attempts to add a supplementary

[8] These points were cogently advanced in petitioner's petition for writ for certiorari in *Davila*.

right of action are preempted. *Rush Prudential*, 536 U.S. at 379-80; *Pilot Life*, 481 U.S. at 56. Third, the complete preemption of a state cause of action turns not on the manner in which it is pleaded (tort, contract, or otherwise), or on the relief it seeks (at law or in equity), but on whether it interferes with the administration of benefits under an ERISA plan. *Davila*, 542 U.S. at 214; *Pilot Life*, 481 U.S. at 51-52. By allowing McAteer to proceed with her claim in state court, the Fifth Circuit disregarded these rules of law. Because the Fifth Circuit's decision runs directly contrary to each and every one of these principles, review by this Court is warranted to correct the Fifth Circuit's plain departure from this Court's long-standing and well-reasoned precedents.[9]

The issue presented is a significant and recurring one and ripe for this Court's intervention, be it plenary or summary. Millions of Americans receive medical and disability benefits through employer-provided benefit plans governed by ERISA both in Texas and in states where workers' compensation coverage is compulsory. State law claims grounded in the concept of failure to maintain a safe workplace could impede the administration of those plans. Congress enacted ERISA to encourage employers to offer benefit plans by assuring a predictable set of liabilities under a uniform and

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[9] Under the circumstances here, the Fifth Circuit's plain refusal to follow controlling authority could appropriately be remedied by summary reversal.

exclusive federal regulatory scheme. *Rush Prudential*, 536 U.S. at 379. The Fifth Circuit's decision below frustrates that objective and warrants this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

April 14, 2008.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-41725

LE ANN MCATEER,
Plaintiff-Appellant,

v.

SILVERLEAF RESORTS, INC.;
SILVERLEAF CLUB,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PRADO, Circuit Judge:

At issue in this appeal is the continued validity of our precedent regarding whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, preempts state law claims of negligence for failing to maintain a safe work environment. Because the Supreme Court has not reversed our prior decision on this point and because the plaintiff did not make her argument moot by adding an ERISA claim to her case, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Defendant-Appellee Silverleaf Resorts, Inc. ("Silverleaf") employed Plaintiff Appellant Le Ann McAteer ("McAteer") as a Landscaper at the Holly Lake Ranch from August 19, 2004, to August 2, 2005. Silverleaf is a non-subscriber to Texas workers' compensation insurance, choosing instead to provide benefits to its employees through the Silverleaf Club Employee Injury Benefit Plan ("the Plan"), which is governed by ERISA. The Plan gives no-fault benefits employees in the event of a job-related injury and requires arbitration of any disputes regarding benefits. McAteer enrolled in the Plan and signed an agreement that the Plan would provide the exclusive avenue of relief for on-the-job injuries.

McAteer claims she suffered a job-related injury on July 11, 2005, when she tripped over a cement parking stop while using a weedeater in a parking lot. She landed with her back on the weedeater and was subsequently diagnosed with a herniated disk that required surgery. McAteer did not report this injury to Silverleaf until September 2005, which was after her employment with Silverleaf ended. At that time, McAteer completed an injury claim form and submitted it to the Plan, where it was reviewed by the Plan's administrator, Providence Risk Services, Inc. ("Providence"). Providence issued an initial determination denying McAteer's claim because she had not timely reported her injury, had not sought advance approval for her medical treatment, and had not used a Plan-approved physician. McAteer did not pursue an administrative appeal.

II. PROCEDURAL HISTORY

McAteer filed suit against Silverleaf in Texas state court on January 19, 2006, alleging that Silverleaf acted negligently by (1) failing to provide McAteer with a safe place to work, (2) failing to properly secure the parking stop, (3) assigning McAteer to work in the parking lot when it knew the parking stops were hazardous, (4) failing to warn McAteer of the improperly secured parking stops, and (5) failing to implement procedures for employee safety that would have prevented the accident.

Silverleaf timely removed the suit on February 17, 2006, asserting that federal subject matter jurisdiction existed because ERISA completely preempted McAteer's causes of action. McAteer filed a motion to remand and argued that ERISA did not preempt her causes of action because she had brought only state law negligence claims. Silverleaf then filed a Motion to dismiss and compel arbitration based on the arbitration agreement contained in the Plan. On May 1, 2006, the district court denied McAteer's motion to remand, concluding that the Supreme Court had overruled the Fifth Circuit's precedent regarding ERISA's preemption of state law negligence claims. The district court ruled that McAteer's claims were preempted because she had enrolled in an ERISA plan which provided the exclusive procedures for recovery for on-the-job injuries.

The district court then ordered mediation, which was required by the Plan's procedures, and stayed the case for four months. Three months later, McAteer amended her complaint to assert a claim under ERISA, "while still respectfully disagreeing"

with the district court's preemption decision.[1] After the mediation proved unsuccessful, the district court granted Silverleaf s motion to compel arbitration and dismissed McAteer's claims with prejudice. McAteer now appeals the final judgment and order denying remand. We review de novo the district court's legal determination that ERISA preempted McAteer's state law claims. *See Bank of La. v. Aetna U.S. Healthcare Inc.*, 468 F.3d 237, 241 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1826 (2007).

III. DISCUSSION

A. Whether McAteer's Appeal is Moot

We turn first to Silverleafs argument that McAteer's appeal is moot because she amended her complaint to include a claim for relief under ERISA, thus voluntarily creating federal jurisdiction. Silverleaf rests its conclusion on the judicially created "voluntary-involuntary" rule, which provides that "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." *Crockett v. R.J. Reynolds Tobacco Co., 436* F.3d 529, 532 (5th Cir.) (internal quotation marks omitted), *cert. denied*, 126 S. Ct. 2945 (2006). We need not consider the voluntary-involuntary rule, however, because this court and the Supreme Court have addressed situations similar to this one, and

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[1] McAteer also added Silverleaf Club as a defendant. Silverleaf Club filed an answer, but was not mentioned in the district court's dismissal order or judgment. Regardless, the district court clearly intended to dismiss the entire case. Further, the presence of Silverleaf Club does not affect the merits of this appeal, as the issues and analysis remain the same.

those opinions provide the rule of decision in this case.

The Supreme Court considered the effect of the plaintiffs voluntary creation of federal jurisdiction following the denial of a motion to remand in *Caterpillar, Inc. v. Lewis,* 519 U.S. 61 (1996). There, the undisputed facts demonstrated that there was no diversity jurisdiction when the case was removed and that the district court had improperly denied the plaintiffs motion for remand. *Id.* at 70. Prior to a final judgment, though, the plaintiff voluntarily settled with the non-diverse defendant, thereby creating federal jurisdiction. *Id.* at 64. Following three years of litigation and a six-day trial that resulted in a verdict for the defendant, the plaintiff appealed on the ground that the removal was improper. *Id.* at 66-67.

In conducting its analysis, the Supreme Court stated that "by timely moving for remand, [the plaintiff] did all that was required to preserve his objection to removal." *Id.* at 74. Thus, despite the voluntary creation of jurisdiction (by settling with the non-diverse defendant), the plaintiff did not waive his claim that removal was improper. The Court ultimately decided, however, that because jurisdiction existed at the time of the final judgment and the case had proceeded all the way through trial after three years of litigation, "considerations of finality, efficiency, and economy" were "overwhelming." *Id.* at 75. Therefore, the Court permitted the verdict to stand. *Id.* at 77-78.

This court in *Waste Control Specialists, L.L.C. v. Envirocare of Texas, Inc.,* 199 F.3d 781 (5th Cir.), *opinion withdrawn and superseded in part,* 207 F.3d 225 (5th Cir. 2000), relied on the Supreme Court's reasoning in *Caterpillar* to analyze similar facts. In

Waste Control Specialists, we faced a situation in which a district court improperly concluded that federal antitrust law preempted the plaintiffs claims. 199 F.3d at 782-84. After its motion to remand was denied, the plaintiff added a federal antitrust claim, but it appealed on the ground of improper removal when its suit was dismissed on a Rule 12(b)(6) motion. *Id.* at 782-83.

On appeal, we first determined that the case as originally removed was not preempted and should have been remanded. *Id.* at 783-84. We then considered the effect of the plaintiffs subsequent addition of a federal claim and cited *Caterpillar* for the conclusion that "timely objection can preserve the jurisdictional claim despite subsequent amendment, even if other considerations may ultimately outweigh that objection." *Id.* at 785. Because the plaintiff timely objected to removal, we held that it had not waived its objection to that removal despite the subsequent addition of a federal claim. *Id.* at 787. An important factor in our decision was that the suit had been dismissed on a Rule 12(b)(6) motion, rather than after a trial on the merits, which distinguished it from *Caterpillar* (a case that had proceeded through trial). *See id.* at 786-87.

Thus, both *Caterpillar* and *Waste Control Specialists* recognize that a motion to remand preserves arguments regarding improper removal, and a subsequent amendment to create federal jurisdiction does not necessarily make those arguments moot. However, if subject matter jurisdiction is eventually established and a case remains in the federal court system for a significant length of time or reaches a verdict on the merits, considerations of finality and economy may result in

affirming a judgment despite the improper removal. *See Caterpillar*, 519 U.S. at 75.

Here, as in *Caterpillar* and *Waste Control Specialists,* McAteer preserved her argument regarding improper removal by timely moving to remand the case. It was only after the district court denied her motion to remand that she added an ERISA claim, and even then, she emphasized her disagreement with the remand decision. Further, the instant case has spent little time in federal court and its merits have never been addressed. Therefore, the concerns of finality, efficiency, and economy that permitted the verdict to stand in *Caterpillar* are not present in this case. Consequently, McAteer's decision to add an ERISA claim following the district court's denial of her motion to remand does not make her appeal of the remand order moot, and considerations of finality and efficiency do not counsel against hearing the merits of her appeal.

B. Whether ERISA Preempts McAteer's Negligence Claims

Because McAteer's appeal is not moot, we now turn to the merits of her arguments regarding ERISA preemption. As noted above, McAteer asserts that because she brought only state law negligence claims, ERISA does not preempt her causes of action and her case should be remanded to state court. In support of her position, McAteer relies on this court's decision in *Hook v. Morrison Milling* Co., 38 F.3d 776 (5th Cir. 1994), in which we held that ERISA does not preempt state law negligence claims. *Id.* at 786. Silverleaf, however, contends that *Hook* is no longer good law in light of the Supreme Court's decision in *Aetna Health Inc. v. Davila,* 542 U.S. 200 (2004). Therefore,

Silverleaf asserts that McAteer's claims do arise under federal law and are properly removable.

Typically, whether a claim arises under federal law is determined by the "well-pleaded complaint" rule. *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 543 (5th Cir. 2005). Pursuant to the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of plaintiffs properly pleaded complaint." *Id.* (internal quotation marks omitted). However, the Supreme Court has created an exception to this rule when federal law wholly displaces a state law cause of action through complete preemption. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). ERISA provides one such area of complete preemption. *See id.*

"The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *Davila*, 542 U.S. at 208. To that end, § 514(a) of ERISA, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." Further, § 502(a) of ERISA, 29 U.S.C. § 1132(a), sets forth the exclusive grounds for relief under ERISA. The Supreme Court has stated that a law "relates to" an employee benefit plan and is preempted if it has a connection with or reference to the plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

Under Fifth Circuit precedent, to determine whether a state law relates to a plan for purposes of ERISA preemption, the court asks "(1) whether the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) whether the

claims directly affect the relationship among the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries." *Woods v. Tex. Aggregates, L.L.C.*, 459 F.3d 600, 602 (5th Cir. 2006); *Hook*, 38 F.3d at 781. In *Hook*, this court addressed those questions in a situation identical in all relevant respects to the instant appeal and concluded that ERISA did not preempt the plaintiffs claims. 38 F.3d at 786.

As described by the court in *Hook*, Morrison Milling Company ("MMC") enacted an ERISA plan in lieu of subscribing to Texas workers' compensation insurance. *Id.* at 778. As part of the plan, Roxanne Hook agreed to waive her rights to bring suit against MMC and agreed that the plan's benefits were the exclusive remedy for personal injuries. *Id.* at 778-79. Following a job-related injury, Hook brought a state law negligence claim against MMC, and MMC removed the case on the basis of ERISA preemption.[2] *Id.* at 779.

On appeal, we held that Hook's negligence claim was not preempted by ERISA, characterizing it as "totally independent from the existence and administration of MMC's ERISA plan." *Id.* at 784. We also noted that Hook's claim did not affect Hook's administrator-beneficiary relationship with MMC, but only the employer-employee relationship. *Id.* at 783. With respect to MMC's contention that Hook's claim related to an ERISA plan because Hook waived her claims as part of her enrollment in the ERISA

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[2] Hook also brought a wrongful discharge claim that was preempted by ERISA, but she dropped the wrongful discharge claim following removal and sought remand of the negligence claim. *Id.* at 779.

plan, we stated that this argument "turn[ed) ERISA preemption analysis on its head . . . ." *Id.* at 785. We reasoned that following MMC's logic would enable employers to avoid any state law simply by referring to that law in its ERISA plan. *Id.* Therefore, we "[chose] to adhere to our traditional mode of analysis, as prescribed in ERISA § 514(a): a law or claim is preempted when *it* relates to an ERISA plan, and not the reverse." *Id.*

Under *Hook,* the result in this case is clear. State law negligence claims for failing to maintain a safe workplace are not preempted by ERISA, even if the employee signed a waiver of such claims in order to participate in an ERISA plan. Absent an intervening en bane or Supreme Court decision, we are bound by the panel's decision in *Hook. See United States v. Rodriguez-Jaimes,* 481 F.3d 283, 288 (5th Cir. 2007). Consequently, McAteer's state law negligence claims in this case are not preempted by ERISA and must be remanded.

Silverleaf does not dispute that *Hook* requires this result, but instead contends that *Hook* is no longer good law as a result of the Supreme Court's decision in *Davila.* We disagree. In *Davila,* the Supreme Court reversed this court's holding that certain state law claims were not preempted by ERISA. 542 U.S. at 214. At issue were claims by several plaintiffs that administrators of ERISA plans failed to use ordinary care when making medical treatment decisions. *Id.* at 204-05. The plaintiffs brought their claims under section 88.002 of the Texas Civil Practice & Remedies Code, which imposes a duty of ordinary care on health maintenance organizations when making health care treatment decisions. *Davila,* 542 U.S. at 205.

The Supreme Court held that a claim was preempted (1) "if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B)," and (2) "where there is no other independent legal duty that is implicated by a defendant's actions . . ." *Id.* at 210. The Court determined that the plaintiffs in *Davila* "complain[ed] only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans." *Id.* at 211. The Court recognized that Texas law created a duty of ordinary care that was owed by the defendants but that such duty was not independent of the ERISA plans. *Id.* at 212-13. In other words, whether the plan administrators negligently declined to pay for certain medical treatments under Texas law depended on whether the ERISA plans provided for such coverage. *See id.* at 213 (stating that the interpretation of the plan was an "essential part" of the plaintiffs' claims).

The Supreme Court criticized this court for focusing on the distinction between a tort claim and a contract claim, stating that the label of a cause of action is not determinative. *Id.* at 214-15. Further, the Court noted that ERISA need not strictly duplicate a state law cause of action in order for the state law to be preempted. *See id.* at 214-16 (noting that even if a state law authorizes remedies beyond those permitted in ERISA, it may still be preempted).

In the instant case, Silverleaf has not demonstrated how *Hook* is inconsistent with *Davila*. Silverleaf quotes in detail the Supreme Court's criticism of the Fifth Circuit for distinguishing between tort and contract claims and the Supreme Court's conclusion that even state law claims that are not identical to ERISA claims can be preempted.

However, simply because the tort claims in *Davila* were preempted by ERISA does not mean that all tort claims are similarly preempted. Instead, the court must apply the reasoning used in *Davila* and consider not only whether McAteer's claims could have been brought under ERISA but also whether her claims arise from a legal duty independent of ERISA. *See id.* at 210. This court has already determined that state law negligence claims for failing to maintain a safe workplace are independent of ERISA. *See Hook*, 38 F.3d at 784. Thus, even under *Davila*, McAteer's claims are not completely preempted by ERISA.

Further, this court has continued to apply *Hook* even after the *Davila* decision. In *Woods v. Texas Aggregates, L.L.C.*, we considered whether ERISA preempted a plaintiff's claim for negligent maintenance of an unsafe workplace. 459 F.3d at 601. Although we cited *Davila* for general preemption propositions, *id.* at 602, we then applied *Hook* to conclude that ERISA did not preempt the plaintiffs negligence claims, noting that "*Hook* remains good law." *Id.* at 602-03, 603 n.5.

Consequently, we are bound by both *Hook* and *Woods* in this case and conclude that McAteer's workplace negligence claims are not preempted by ERISA. *Davila* does not mandate a different result, and the district court erred in so ruling. Therefore, we REVERSE the judgment of the district court.

V. CONCLUSION

Because McAteer's claims are not preempted by ERISA and she did not make her argument moot by adding an ERISA claim, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 06-41725

LE ANN MCATEER;
Plaintiff – Appellant

v.

SILVERLEAF RESORTS, INC.; SILVERLEAF CLUB
Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Texas, Tyler.

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE February 7, 2008

Clerk U.S. Court of Appeals,
Fifth Circuit
By: s/_____
Deputy
New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LE ANN MCATEER	§	
	§	
v.	§	CIVIL ACTION
	§	NO. 6:06-cv-68
SILVERLEAF RESORTS, INC.	§	

ORDER DENYING PLAINTIFF'S MOTION TO REMAND

Now before this Court is Plaintiff's Motion to Remand (Doc. No. 5) and Defendant's Response and Brief in Opposition to Plaintiff's Motion to Remand (Doc. No. 11). Based on the parties' filings and the applicable law, it is the opinion of the Court that the federal court retains subject matter jurisdiction over this case. Accordingly, for the reasons discussed below, Plaintiff's motion is DENIED.

I. Background

From approximately August 19, 2004 to August 2, 2005, Plaintiff Le Ann McAteer ("McAteer") worked as a landscaper by Defendant Silverleaf Resorts, Inc. ("Silverleaf")[1] at Holly Lake Ranch. McAteer's employer did not subscribe or purchase workers'

[1] Defendant avers that Plaintiff has not sued her employer, Silverleaf Club. Instead Defendant claims that she has sued an affiliated corporation, Silverleaf Resorts, Inc. (SRI). The Court does not decide the issue of the correct entity at this time; the Court will refer to Defendant in this Order simply as "Silverleaf."

compensation insurance; instead, Defendant voluntarily established an on-the-job injury plan for the benefit of employees who suffer job-related injuries. McAteer enrolled in the Silverleaf Club Employee Injury Benefit Plan (the "Plan") and signed the Acknowledgment of Receipt of the Silverleaf Club Arbitration Policy and Procedures outlining the Summary Plan Description and the Election and Agreement to Arbitrate.

On July 11, 2005, McAteer received personal injuries while working at Defendant's facilities in Wood County, Texas. McAteer allegedly tripped over a car bumper, or parking wedge, while using a weed eater and landed with her back on the motor of the weed eater. Though McAteer claims she reported her injury to a supervisor shortly after it happened, she did not report her injury to the Plan Representative until after her employment ended. McAteer then completed an injury claim form and submitted it to the Plan. Her claim was reviewed and ultimately denied by Providence Risk Services, Inc., the claims administrator for the Plan. The initial determination contained a notice of appeal rights, which provided for an appeal of the initial determination directly to the Plan Administrator.

McAteer declined to pursue an administrative appeal. Instead, McAteer initiated a lawsuit in state district court in Wood County, Texas, asserting negligence claims under Texas common law. Subsequently, Defendant filed a timely Notice of Removal to this Court, maintaining that this Court has original jurisdiction because McAteer's claims arise under the Employment Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* (1976).

McAteer then filed a Motion to Remand, claiming that she is not seeking to recover or appeal any decision regarding ERISA benefits; she has merely asserted state common law claims in a negligence action against an employer who purposely chose not to subscribe to workers' compensation insurance for its employees. The issue of whether this case should be remanded to state court is now properly before this Court.

II. Legal Standard

Federal courts are courts of limited jurisdiction, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377(1994). Each federal court has a constitutional obligation to satisfy itself that subject matter jurisdiction is proper before the court proceeds to the merits of the case. *Steel Co. v. Citizens for a Better Env 't*, 523 U.S. 83, 93-102 (1998). If at any time the district court finds it lacks subject matter jurisdiction, the case shall be remanded. 28 U.S.C. § 1447(c).

Upon a plaintiff's motion to remand, the removing defendants have the burden of establishing that federal subject matter jurisdiction exists. *Drawhorn v. Qwest Comm. Int'l, Inc.*, 121 F. Supp. 2d 554, 559 (E.D. Tex. 2000). Any significant doubts regarding the propriety of removal should be resolved in favor of remand. *Id.*

A. "Well-Pleaded Complaint" Rule

Congress has given federal district courts jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000). Generally, to determine whether a case "arises under" federal law, a federal

court looks at the face of the plaintiff's complaint. Under the "well-pleaded complaint" rule, a movant may not remove a case to federal court unless the plaintiff's complaint establishes that the cause of action arises under federal law. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-11 (1983); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). The plaintiff's well-pleaded complaint, and not the defendant's removal petition, must establish issues of federal law. *Howery*, 243 F.3d at 916 n.12.

B. "Artful Pleading" Doctrine - an Exception to the "Well-Pleaded Complaint" Rule

Even where a complaint is not characterized as a federal claim, a federal court may still find that a plaintiffs claim arises under a federal law within the meaning of section 1331 and confer jurisdiction upon the federal court. *Drawhorn*, 121 F. Supp. 2d at 559. "[E]ven if the plaintiff has couched his pleading exclusively in terms of state law[, t]he reviewing court looks to the substance of the complaint, not the labels used in it." *Id.* (quoting *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980)). If the claim under state law involves a substantial federal issue, the artful pleading exception will apply, and jurisdiction before the federal court is proper. *Id.* at 559-60.

Falling under the artful pleading exception are several categories of cases where federal courts may exercise jurisdiction over state claims despite the well-pleaded complaint rule: Cases involving substantial, disputed questions of federal law, federal claim preclusion cases, and those involving complete preemption. *Id.* at 560 n.5. When a federal statute

completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law and can be removed. *Beneficial Nat. Bank v. Anderson,* 539 U.S. 1, 8 (2003).

Congress may so completely preempt a particular area of law that any civil complaint raising a claim in that area is necessarily federal in character, no matter how it is pleaded. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64 (1987). A federal court must determine if the issue before it is one Congress deemed to be within the province of the federal judiciary. *Metropolitan Life,* 481 U.S. at 67 (noting that federal question jurisdiction "exists when Congress has clearly manifested an intent to make certain actions removable"); *Hart v. Bayer Corp.,* 199 F.3d 239, 243-45 (5th Cir. 2000).

Federal courts presented with issues of removal and federal question jurisdiction are faced with decisions requiring "sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 810 (1986). Indeed, complete preemption has been found in only three distinct areas: LMRA, ERISA, and Indian land grant rights. *Drawhorn,* 121 F. Supp.2d at 560 (citing 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3522 (2d ed. 1984 & 1999 supp.). Remand of this case turns on the issue of complete preemption under ERISA.[2]

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[2] Another type of preemption, known as "conflict" or "ordinary" preemption, "arises when a federal law conflicts with state law, thus providing a federal defense to a state law claim,

1. ERISA Preemption

Section 502(a) of ERISA governs complete preemption and provides the exclusive civil enforcement provision for ERISA plan participants or beneficiaries to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).[3] Thus, the ERISA civil enforcement mechanism is one of those provisions with such "extraordinary preemptive power" that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. *Metropolitan Life,* 481 U.S. at 65-67. In other words, a claim "within the scope" of Section 502(a) presents a federal question, and thus the jurisdictional basis for removal under 28 U.S.C. § 1446, no matter how artfully pleaded as a state cause of action. *Bullock v. Equitable Life Assur.*

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but does not completely preempt the field of state law so as to transform a state law claim into a federal claim." *Arana v. Ochsner Health Plan,* 338 F.3d 433, 439 (5th Cir. 2003). Under ERISA's conflict preemption provision, § 514(a), "any and all State laws [are displaced or superceded] insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). State law "relates to" an ERISA plan "if it has a connection with or reference to" an employee benefit plan. *Shaw v. Delta Air Lines,* 463 U.S. 85, 96-97 (1983).

[3] An employee benefit plan is defined as "any plan, fund or program" established or maintained by an employer or employee organization to provide participants and their beneficiaries with "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. § 1002(1).

Soc. of U.S., 259 F.3d 395, 400 (5th Cir. 2001).

2. Former Fifth Circuit Precedent

Unless Congress has clearly demonstrated an intent toward preemption, there remains a presumption against ERISA preemption of state laws in those areas which have traditionally been left to the states. *Egelhoff v. Egelhoff,* 532 U.S. 141(2001); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 654-55 (1995).

Indeed, in the Fifth Circuit, an employee's purported state law negligence claim based on her employer's ERISA on-the-job injury claim has, until now, been construed as an independent legal duty unrelated to the plan and not a proper basis for removal. *See Hook v. Morrison Milling Co.,* 38 F.3d 776, 781 (5th Cir. 1994). Plaintiff adheres to this precedent, claiming that because she sues only in tort for personal injuries and failure to provide a safe work place, and not in breach of contract, and because she asserts that she seeks no benefits under the employer's plan, the claim is not preempted.

However, the United States Supreme Court recently rejected the Fifth Circuit's approach in *Aetna Health Inc. v. Davila,* 542 U.S. 200 (2004). Prior to the Supreme Court's decision in *Davila,* the Fifth Circuit permitted a plan participant to litigate in state court claims that clearly related to an ERISA plan merely by labeling them "tort claims," while disavowing any claim for benefits under an ERISA plan. *See Davila,* 542 U.S. at 206 (citing *Roark v. Humana, Inc.,* 307 F.3d 298, 309 (5th Cir. 2002),

rev'd sub nom. Davila, 542 U.S. 200 (2004)).[4]

Prior to *Davila,* the Fifth Circuit had recognized that state causes of action that "duplicat[e] or fal[l] within the scope of an ERISA § 502(a) remedy" are completely preempted and hence removable to federal court. *Roark,* 307 F.3d at 305. In *Roark,* the Fifth Circuit had determined that the respondents' claims did not fall within the scope of section 502(a)(1)(B) because they asserted "tort claims" and requested "tort damages" arising from "an external, statutorily imposed duty of 'ordinary care' rather than a cause of action for breach of contract and reimbursement for benefits denied them. *Id.* at 309.

However, when the Supreme Court opined on the issue in *Davila,* it looked past the plaintiffs' efforts to characterize their claims as tort claims that were wholly unrelated to their employers' plans. *Davila,* 542 U.S. at 214-15. The Supreme Court found these claims to be, in reality, claims for benefits or improper handling of benefits claims that were completely preempted by ERISA § 502(a) and removable to federal district court. *Id.* As the Supreme Court opined, "distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA simply 'by relabeling their contract claims as claims for tortious breach of

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[4] When a decision of a court of appeals is obviously undermined by a more recent decision of the United States Supreme Court, a district court has an obligation to recognize the former as overruled. *Pappas v. City of Lebanon,* 331 F. Supp. 2d 311, 319 (M.D. Pa. 2004); *see also Fleming Cos. v. USDA,* 322 F. Supp. 2d 744, 754 (E.D. Tex 2004).

contract.'" *Id.*

The Supreme Court elucidated that "where the individual is entitled to coverage for medical care only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls 'within the scope of' ERISA § 502(a)(1)(B)." *Id.* at 210. In other words, if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA 502(a)(1)(B). *Id.* A legal duty is independent if it derives entirely from the particular rights and obligations established by [ERISA] plan benefits. *Id.*

Furthermore, the mere fact that the state cause of action attempts to authorize remedies beyond those authorized by ERISA § 502(a) does not put the cause of action outside the scope of the ERISA civil enforcement mechanism. The Supreme Court has considered several cases that were labeled either tort or tort-like causes of action which all sought remedies beyond those authorized under ERISA. *See, e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 43 (1987) (seeking compensatory and punitive damages); *Metropolitan Life,* 481 U.S. at 61-62 (seeking damages for mental anguish); *Ingersoll-Rand v. McClendon,* 498 U.S. 133, 136 (1990) (seeking damages for mental anguish as well as punitive damages). In each of these cases, the plaintiffs' claims were preempted.

III. Analysis

In this case, Plaintiff's original complaint does not state that its action falls under ERISA. Indeed, McAteer asserts only state law claims for negligence and breach of the duty to provide a safe work place. (Pl.'s Orig. Pet. ¶ VI) The question presented to this Court then, after *Davila,* is whether McAteer states violations of legal duties that arise independently of ERISA or the terms of the employee benefit plan at issue. In other words, the Court is required to assess whether Silverleaf owed McAteer a legal duty independent from obligations under the ERISA plan.

Texas allows private sector employers to reject the Texas Workers' Compensation Act and to not provide workers' compensation insurance coverage to their employees. TEX. LAB. CODE § 406.002. In this case, Defendant, as a non-subscribing employer, established Silverleaf Club Employee Injury Benefit Plan. The Silverleaf Club Employee Injury Benefit Plan and Summary Plan Description both state that Silverleaf is a nonsubscriber to the Texas Workers' Compensation Act and that the Plan is an employee group health and disability welfare benefit plan under the federal Employee Retirement Income Security Act of 1974 ("ERISA").

On August 19, 2004, McAteer agreed to the terms of the "Election and Arbitration Agreement" and voluntarily elected to participate in the ERISA employee welfare benefit plan. McAteer further signed that she understood that Silverleaf instead voluntarily established the Plan under federal law to provide benefits for on-the-job injuries. McAteer agreed to follow the rules and procedures described in the Summary Plan Description.

As part of her enrollment, McAteer signed that she understood that Silverleaf does not carry workers' compensation for its Texas employees and that it is a "nonsubscriber" under the Texas Workers' Compensation Act. As part of her voluntary participation in the Plan, McAteer agreed to forego her right to jury trial and to submit all claims she might have, including tort claims for negligence, negligence per se and gross negligence, to arbitration.

Because McAteer voluntarily enrolled in the Plan, her subsequent on-the-job injury claims are thus subject to the Plan she enrolled in. Because the rights and obligations of the parties are defined by reference to the ERISA-regulated plan, Plaintiff cannot establish an independent legal duty. Even giving deference to the well-pleaded complaint rule, the Court doesn't have to look far to determine that the plaintiff's characterization of her claims involves a substantial issue that Congress has deemed to be within the province of the federal judiciary.

Plaintiff seeks redress for her on-the-job injury. Because the Plan provides the exclusive claims-handling procedure for benefit claims, and because her on-the-job injury claims directly relate to and are covered by the terms of the ERISA employee welfare benefit plan which she voluntarily enrolled in, the Court finds that Silverleaf did not owe McAteer a legal duty independent from obligations under the ERISA plan. Accordingly, the Court finds McAteer's claims are completely preempted by ERISA.

IV. Conclusion

In summary, the Court concludes that Plaintiff's claims are clearly within the purview of the

federal courts so that removal is jurisdictionally proper. Accordingly, Plaintiff's Motion to Remand is DENIED.

SIGNED this 1st day of May, 2006.

/s/
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LE ANN MCATEER	§	
	§	CIVIL ACTION
v.	§	NO. 6:06-cv-68
	§	
SILVERLEAF RESORTS, INC.	§	

ORDER

Now before this Court is Defendant's[1] Motion to Compel Arbitration and to Dismiss or to Stay Court Proceedings (Doc. No. 7), Defendant's Memorandum in Support (Doc. No. 8) and Supporting Affidavits (Doc. Nos. 9-10), Plaintiff's Response (Doc. No. 12), and Defendant's Reply (Doc. No. 13). Based on the parties' filings and the applicable law, it is the opinion of the Court that the case shall be stayed.

I. Background

The facts of this case were set out in detail in the Court's Order Denying Plaintiffs Motion to Remand signed May 1, 2006. For purposes of this motion, Plaintiff Le Ann McAteer (McAteer) enrolled in her employer's Employee Injury Benefit Plan ("Plan"), which her employer provided in lieu of subscribing to workers' compensation. As part of her

[1] Defendant avers that Plaintiff has not sued her employer, Silverleaf Club. Instead Defendant claims that she has sued an affiliated corporation, Silverleaf Resorts, Inc. (SRI). The Court does not decide the issue of the correct entity at this time; the Court will refer to Defendant in this Order simply as "Silverleaf."

enrollment, McAteer signed the Acknowledgment of Receipt of the Silverleaf Club Arbitration Policy and Procedures outlining the Summary Plan Description and the Election and Agreement to Arbitrate.

On July 11, 2005, McAteer received personal injuries while working at Defendant's facilities in Wood County, Texas. McAteer allegedly tripped over a car bumper, or parking wedge, while using a weed eater and landed with her back on the motor of the weed eater. Though McAteer claims she reported her injury to a supervisor shortly after it happened, she did not report her injury to the Plan Representative until after her employment ended. McAteer then completed an injury claim form and submitted it to the Plan. Her claim was reviewed and ultimately denied by Providence Risk Services, Inc. ("Providence"), the third-party claims administrator for the Plan. The Initial Determination issued by Providence contained a notice of appeal rights, which provided for an appeal of the Initial Determination directly to the Plan Administrator.

McAteer declined to pursue an administrative appeal on the Initial Determination. Instead, McAteer initiated a lawsuit in state district court in Wood County, Texas, asserting negligence claims under Texas common law. Subsequently, Defendant filed a timely Notice of Removal to this Court, maintaining that this Court has original jurisdiction because McAteer's claims arise under the Employment Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* (1976). This Court denied McAteer's motion to remand the case to state court, finding McAteer's state law claims are preempted by ERISA following the United States Supreme Court's decision in *Aetna Health Inc. v.*

Davila, 542 U.S. 200 (2004).

Silverleaf now files a motion to compel arbitration and to dismiss or to stay court proceedings pending arbitration and/or mediation in accordance with the terms of the parties' agreement. Defendant's motion is now properly before the Court.

II. Discussion

The Federal Arbitration Act states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

A party seeking to compel arbitration under the Federal Arbitration Act ("FAA") must first establish that: (1) there is a valid arbitration agreement, and (2) the claims raised fall within that agreement's scope. *Fleetwood Enters, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005). Next, the Court must determine "whether legal constraints external to the parties' agreement foreclosed the

arbitration of those claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Doubts regarding the agreement's scope are resolved in favor of arbitration because there is a presumption favoring agreements to arbitrate under the FAA. *In re FirstMerit Bank*, 52 S.W.3d 749, 753 (Tex. 2001). However, the presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

When deciding whether the parties' agreed to arbitrate the dispute in question, courts generally apply state-law principles that govern the formation of contracts. *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445 (5th Cir. 2001) (per curiam). In Texas, the objective intent as expressed in the agreement controls the construction of an unambiguous contract. *See Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000) (holding that a court must give effect to parties' intentions as expressed in the document). The trial court's determination of an arbitration agreement's validity is a legal question. *Webster*, 128 S.W.3d at 227.

Texas allows private sector employers to reject the Texas Workers' Compensation Act and to not provide workers' compensation insurance coverage to their employees. TEX. LAB. CODE § 406.002. In this case, Defendant, as a non-subscribing employer, established the Silverleaf Club Employee Injury Benefit Plan. The Plan and Summary Plan Description both state that Silverleaf is a nonsubscriber to the Texas Workers' Compensation

Act and that the Plan is an employee group health and disability welfare benefit plan under the federal Employee Retirement Income Security Act of 1974 ("ERISA").

In pertinent part, the Plan provides:

1. Employee Election: In order to elect to participate in the Plan and as a condition to participation in this Plan and in exchange for eligibility for any benefits provided for in this Plan, an Employee must fully execute as agreeing to the terms of an Election and Arbitration Agreement...

2. Arbitration of Employment Disputes: By executing and agreeing to an Election and Arbitration Agreement, an Employee affirmatively agrees to submit to binding arbitration all claims or disputes covered by the Election and Arbitration Agreement. The result of the binding arbitration will be the sole and exclusive remedy for resolving any such claim or dispute. The Election and Arbitration Agreement is mutually binding upon the Company (and the Employers) and the Participant, as well as the Participant's Beneficiaries, spouse, heirs, parents and legal representatives and the Company's (and each Employer's) successors, subsidiaries, affiliates, directors, officers, partners, shareholders, managers and agents. Any arbitration proceeding initiated under the Election and

> Arbitration Agreement shall be conducted in accordance with the provisions of Paragraph B. below, which provisions are expressly incorporated by reference into, and made part of, the form of Election and Arbitration Agreement attached hereto as Exhibit "A".
>
> 9. Interstate Commerce and the Federal Arbitration Act: I understand and agree that the Company and the Employers are involved in transactions involving interstate commerce . . . and that my employment with my Employer and participation in the Plan involve such commerce. The Federal Arbitration Act, Title 9 of the United States Code, will govern the interpretation, enforcement, and all judicial proceedings under and/or with respect to the Election and Arbitration Agreement and this Paragraph B.[2]

Under the heading "Mutual Promises to Resolve Claims by Binding Arbitration, the Election and Arbitration Agreement provides:

> I recognize that disputes may arise between the Company(or one of its affiliates) and me during or after my employment with the Company. I understand and agree that any and all such disputes than cannot first be resolved through

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[2] Silverleaf Club Employee Injury Benefit Plan, Decl. of Cathy Payne, Ex. B, Attach. to Def 's Mem. in Support of Mot. to Compel Arbitration and to Dismiss or to Stay Ct. Proceedings, Doc. Nos. 7-10.

the Company's internal dispute resolution procedures or mediation must be submitted to binding arbitration.

I acknowledge and understand that by signing this Agreement I am giving up the right to a jury trial on all of the claims covered by this Agreement in exchange for eligibility for the Plan's medical, disability, dismemberment, death and burial benefits and in anticipation of gaining the benefits of a speedy, impartial, mutually-binding procedure for resolving disputes.[3]

Under the heading "Claims Subject to Arbitration," the Election and Arbitration Agreement states:

Claims and disputes covered by this Agreement include:

(a) all claims and disputes that I may now have or may in the future have against the Company and/or against it successors and affiliates and/or any of their officers, directors, shareholders, partners, owners, employees and agents, or against any Company employee benefit plan (including the Plan) or the plan's administrator's or fiduciaries . . .

The types of claims covered by this Agreement include, but are not limited to, any and all:

•tort claims, including negligence, negligence

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[3] Election and Arbitration Agreement, Decl. of Bruce J. Douglas, Ex. A, Attach. to Def's Mem. in Support of Mot. to Compel Arbitration and to Dismiss or to Stay Ct. Proceedings, Doc. Nos. 7-10.

per se and gross negligence claims (including claims for personal or bodily injury or physical, mental or psychological injury, without regard to whether or not such injury was sustained on the job) . . .

- claims for benefits under the Plan or any other employee benefit plan or program sponsored by the Company (after exhausting administrative remedies under the terms of such plans);
- claims for a violation of any other federal, state or other governmental law, statute, regulation or ordinance; and
- claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of this Agreement to a particular dispute or claim.[4]

Under the heading "Complete Agreement," the Election and Arbitration Agreement provides:

> The Arbitration Procedures in Section IX of the Summary Plan Description (and also in Section I, Paragraph B of the Plan) are incorporated by reference into, and made part of, this Agreement the same as if they were all written here. This Agreement, together with the incorporated Arbitration Procedures in Section IX of the Summary Plan Description, is the complete agreement between the Company and me. . .[5]

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[4] *Id.*, at p. 2.

[5] *Id.*, at pp. 2-3.

On August 19, 2004, McAteer agreed to the terms of the "Election and Arbitration Agreement" and voluntarily elected to participate in the ERISA employee welfare benefit plan.[6] McAteer does not deny that she enrolled in the Silverleaf Club Employee Injury Benefit Plan nor that she signed and dated the enrollment forms on August 19, 2004. Further, McAteer does not deny that she signed the Employee Acknowledgment of Receipt of the Silverleaf Arbitration Policy and Procedures dated August 19, 2004. At the time of her injury, McAteer had not revoked either her election to participate in the Plan or her agreement to arbitrate her disputes with the defendant. In fact, McAteer had submitted a claim to the Plan for a separate injury approximately three months prior to the injury complained of in this lawsuit.[7]

As part of her enrollment, McAteer signed that she understood that Silverleaf does not carry workers' compensation for its Texas employees and that it is a "nonsubscriber" under the Texas Workers' Compensation Act. As part of her voluntary participation in the Plan, McAteer agreed to forego her right to jury trial and to submit all claims she might have to mutually binding arbitration. The unambiguous language of the arbitration agreement provides for binding arbitration of all claims McAteer might have, including tort claims for negligence,

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[6] *Id.*, at p. 4.

[7] Supervisor's Accident Report, Decl. of Cathy Payne, Ex. F, Attach. to Def.'s Mem. in Support of Mot. to Compel Arbitration and to Dismiss or to Stay Ct. Proceedings, Doc. Nos. 7-10.

negligence per se and gross negligence. The court therefore concludes (1) that there is a valid agreement to arbitrate between the parties, (2) that McAteer's ERISA, couched in terms of a negligence claim, falls within the scope of that agreement, and (3) that there are no legal constraints external to the parties' agreement that foreclose arbitration. Accordingly, the Court holds that the agreement to arbitrate is binding, and McAteer must submit her claims to arbitration. *See Lopez*, 22 S.W.3d at 861.

However, Plaintiff points out that the Silverleaf Club Arbitration Policies and Procedures specifically provide for mediation prior to arbitration:

> The arbitration procedures described here shall not be invoked unless the party seeking arbitration has first mediated the dispute with the other party or parties with a mediator either agreed upon by all parties or, if agreement by all parties cannot be reached, by a mediator appointed by JAMS or the American Arbitration Association. The mediation requirement may be waived by written agreement signed by all parties or their counsel.[8]

Plaintiff argues that, by the terms of its own policies, Defendant is not entitled to compel arbitration because no mediation has occurred or has even been requested. Arguing that the condition precedent to compelling arbitration has not been

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[8] Silverleaf Club Arbitration Policies and Procedures, Decl. of Cathy Payne, Ex. G., Attach. to Def 's Mem. in Support of Mot. to Compel Arbitration and to Dismiss or to Stay Ct. Proceedings, Doc. Nos. 7-10.

satisfied, Plaintiff respectfully suggests that the Court can appoint a mediator to mediate the dispute between Plaintiff and Defendant.

Looking to the terms of the agreement, the Court agrees with Plaintiff that the parties are required to mediate this dispute prior to invoking arbitration procedures. Accordingly, the Court will stay this action to allow the parties to mediate the dispute in accordance with the terms of their agreement.

III. Conclusion

It is THEREFORE ORDERED that this cause of action be STAYED for a term not to exceed four months to allow the parties to proceed with mediation under the terms of their agreement. Once the parties mediate their dispute, or otherwise waive mediation as also provided for by the terms of their agreement, the parties will report, by written notice, the result to the Court. At that time, the Court will rule on Defendant's motion to compel arbitration.

It is SO ORDERED.

SIGNED this 11st day of May, 2006.

/s/
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LE ANN MCATEER	§	
	§	
v.	§	CIVIL ACTION
	§	NO. 6:06-cv-68
SILVERLEAF RESORTS, INC.	§	

ORDER

On May 11, 2006, this Court issued an order staying this action to allow the parties to proceed with mediation under the terms of their agreement (Doc. #15). The Court stated that once the parties mediated their dispute, or otherwise waived mediation as also provided for by the terms of their agreement, the Court would rule on the Defendant's Motion to Compel Arbitration and to Dismiss or to Stay Court Proceedings (Doc. # 7). On September 7, 2006, the Court received a Mediator's Report stating that the mediation conference held on September 6, 2006, had resulted in an impasse (Doc. #21).

On August 30, 2006, Plaintiff filed her First Amended Complaint (Doc. #20). However, nothing in the amended complaint is materially different from Plaintiff's original petition, with the exception of an alternative claim for benefits pursuant to the ERISA plan. Therefore, the analysis the Court made in its May 11, 2006, order as to arbitration is still applicable.

Consistent with the Court's May 11, 2006, order, the Court concludes that (1) there is a valid agreement to arbitrate between the parties, (2) that

Plaintiff's ERISA claim, couched in terms of a negligence claim, falls within the scope of that agreement, and (3) that there are no legal constraints external to the parties' agreement that foreclose arbitration. Accordingly, the Court holds that the agreement to arbitrate is binding, and Plaintiff must submit her claims to arbitration. *See Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000)(holding that a court must give effect to parties' intentions as expressed in the document).

Therefore, Defendant's motion to compel arbitration (Doc. # 7) is hereby GRANTED. Defendant's motion to dismiss this action (Doc. #7) is also hereby GRANTED. This action is therefore DISMISSED with prejudice.

It is SO ORDERED.

SIGNED this 20th day of November, 2006.

/s/
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LE ANN MCATEER	§	
	§	
v.	§	CIVIL ACTION
	§	NO. 6:06-cv-68
SILVERLEAF RESORTS, INC.	§	

FINAL JUDGMENT

On November 20, 2006, this Court granted Defendant's Motion to Compel Arbitration and to Dismiss Court Proceedings (Doc. #7). It is therefore the final judgment of this Court that, because the Plaintiff must submit her claims to arbitration, the claims against the Defendant are DISMISSED with prejudice. All parties are to pay their own costs incurred in this lawsuit.

All relief not previously granted is hereby DENIED.

It is SO ORDERED.

SIGNED this 20th day of November 2006.

/s/
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

United States Code Annotated Currentness
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos) Subtitle B. Regulatory Provisions
Part 5. Administration and Enforcement

♦ § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing

death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section--

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the

Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section--

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from

subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section

1169(a)(2)(B)(ii) of this title to the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action--

(A) with respect to which the State exercises its acquired rights under section 1169(b)(3) of this title with respect to a group health plan (as defined in section 1167(1) of this title), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 1191 of this title.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

(e)(1) Notwithstanding any other provision of this section, this subchapter shall supersede any law of a State which would directly or indirectly prohibit or restrict the inclusion in any plan of an automatic contribution arrangement. The Secretary may prescribe regulations which would establish minimum standards that such an arrangement would be required to satisfy in order for this subsection to apply in the case of such arrangement.

(2) For purposes of this subsection, the term "automatic contribution arrangement" means an arrangement--

(A) under which a participant may elect to have the plan sponsor make payments as contributions under the plan on behalf of the participant, or to the participant directly in cash,

(B) under which a participant is treated as having elected to have the plan sponsor make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or specifically elects to have such contributions made at a different percentage), and

(C) under which such contributions are invested in accordance with regulations prescribed by the Secretary under section 1104(c)(5) of this title.

(3)(A) The plan administrator of an automatic contribution arrangement shall, within a reasonable period before such plan year, provide to each participant to whom the arrangement applies for such plan year notice of the participant's rights and obligations under the arrangement which--

(i) is sufficiently accurate and comprehensive to apprise the participant of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average participant to whom the arrangement applies.

(B) A notice shall not be treated as meeting the requirements of subparagraph (a) with respect to a participant unless--

(i) the notice includes an explanation of the participant's right under the arrangement not to have elective contributions made on the participant's behalf (or to elect to have such contributions made at a different percentage),

(ii) the participant has a reasonable period of time, after receipt of the notice described in clause (i) and before the first elective contribution is made, to make such election, and

(iii) the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the participant.

United States Code Annotated Currentness
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 5. Administration and Enforcement

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a

violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), or (8) of subsection (c) of this section or under subsection (i) or (1) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [FN1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain

appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under

section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 119 lb(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the

requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title or section 1021(f), or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this

title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (1) of section 1021 of this title or 1082(b)(7)(F)(vi) of this title, or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty

against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee

benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a

defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the

court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(0(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary

shall prescribe in regulations which shall be consistent with section 4975(0(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other

person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

END OF DOCUMENT

CAUSE NO. 2006-040

LE ANN MCATEER	§ IN THE DISTRICT
	§ COURT
VS.	§ WOOD COUNTY,
	§ TEXAS
SIVERLEAF RESORTS, INC.	§ 402 JUDICIAL
	DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, Le Ann McAteer, and file this her Original Petition complaining of Silverleaf Resorts, Inc., Defendant, and for causes of action would respectfully show this Honorable Court as follows:

I.

Discovery will be conducted pursuant to Level 2 unless or until a scheduling order is entered by the Court.

II.

Plaintiff is an individual residing in Upshur County, Texas.

III.

Defendant, Silverleaf Resorts, Inc. is a corporate entity which may be served with process at the following address:

Sandra Cearley
1221 Riverbend, Suite 120
Dallas, Texas 75247

IV.

Venue is proper in this court in that a substantial part of the events, occurrences, and omissions forming the basis of this claim occurred in Wood County, Texas. Accordingly, venue is proper in Wood County. Tex. Civ. Prac. & Rem. Code §§15.001 *et seq.*

V.

On or about July 11, 2005, Plaintiff sustained serious and disabling injuries (herniated disk(s)) while working at Defendant's facilities in Wood County, Texas. At the time of the subject incident, Plaintiff was employed by Defendant. Despite the profitability of Defendant's business, Silverleaf Resorts, Inc, did not subscribe to workers compensation insurance for the benefit and protection of their employees.

VI.

On the day in question, Plaintiff was attempting to use a weedeater in and around a parking lot Defendant had negligently installed the parking car stops with landscape timber nails. Because of this negligent installation, the parking lot stop was not stable causing Plaintiff to trip over the negligently installed landscaping timber nail and to fall-on her backin such:a manner that the weedeater lodged between the ground and her back. Subsequent diagnostic testing revealed a herniated disk at L4-L5, the area that was impacted by the weedeater when Ms. McAteer fell. Dr. Jonathan Fontenot subsequently performed surgery at Longview Regional Hospital on Ms. McAteer. Even if this

surgery is deemed to be successful, the injuries sustained as a result of the occurrence made the basis of this suit have been extremely painful and are likely to require expensive future care. Furthermore, these injuries are likely to have a significant impact on Ms. McAteer's future quality of life. It is believed that Ms. McAteer will have a significant degree of future impairment making it difficult if not impossible for hex to earn a decent living considering the nature of her impairment, her educational background, and prior work experience.

VI.

Plaintiff would further allege and assert that Defendant (and those acting in the course and scope of their employment for Defendant) were negligent in one or more of the following respects:

1. In failing to provide Plaintiff with a safe place to work in violation of its statutory duty to do so;
2. In failing to properly secure the parking lot car stop(s) such that they did not create a hazard to Plaintiff and others who were working or walking in close proximity to them;
3. In assigning Plaintiff to work with a weedeater in an area around the parking stops when Defendant knew, or should have known, that the means used to secure the parking lot car stops created a hazard for such employees;
4. In failing to warn Plaintiff and others of the hazard that was created by failing to properly secure the parking lot car stops;

and

5. In failing to implement appropriate procedures for employee safety that would likely have prevented the occurrence in question from taking place.

Each of the foregoing acts of negligence, whether of commission or omission, and whether considered separately or collectively, constituted negligence and/or negligence *per se* and each was a. proximate cause of the subject occurrence and of the injuries and damages for which recovery is sought herein. Plaintiff further invokes the doctrine of *respondent superior*.

VII.

Plaintiff's injuries and damages far exceed the minimum jurisdictional prerequisites of this Court. Plaintiff seeks recovery of all elements of damages, recognized by Texas law, to the extent appropriate under the circumstances in such amount or amounts as the jury may deem fair and reasonable after hearing the evidence at trial.

VIII.

Plaintiff is further entitled to recover both prejudgment and post-judgment interest at the maximum rate and to the maximum extent permitted by Texas law, together with such other and further remedies as are provided in or contemplated by Texas law.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendant be cited to appear and answer herein, and that upon final trial hereof, Plaintiff recover judgment against Defendant for all elements of damages to which she is entitled by

virtue of Texas law, in such amounts as the jury may deem fair and reasonable after hearing the evidence at trial, court costs, pre-judgment and post-judgment interest at the highest rate and to the maximum extent permitted by law, and such other and further relief, at law or in equity, to which Plaintiff may show herself justly entitled to receive.

Respectfully submitted,

Law Offices of
NICHOLS & NICHOLS, P.C.
P.O. Box 2623
Longview, Texas 75606
(903) 757-2464
(903) 757-2287 (FAX)

BY: s/_____
REX A. NICHOLS, JR.
State Bar No. 15006330

Karen Bishop
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(903) 843-3096 (FAX)

ATTORNEYS FOR PLAINTIFF,
LE ANN MCATEER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LE ANN MCATEER,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION
	§	NO. 6:06CV68
SILVERLEAF RESORTS, INC.,	§	
Defendant.		

NOTICE OF REMOVAL

Defendant files this Notice of Removal pursuant to 28 U.S.C. §§ 1331 and 1446, and states as follows:

1. Plaintiff Le Ann McAteer has set forth her claims against Defendant in an Original Petition styled as *Le Ann McAteer v. Silverleaf Resorts, Inc.*, and filed with the District Court, 402nd Judicial District of Wood County, Texas, Cause No. 2006-040, a true and correct copy of which is attached hereto as Exhibit A.

2. This action, as shown below, is one over which this Court has original jurisdiction under the provisions of 28 U.S.C. §§ 1331, 1337, and 1367 and may be removed to this Court by Defendant pursuant to the provisions of 28 U.S.C. §§ 1441 and 1446.

3. Because this is a civil action brought in state court and of which this Court has original jurisdiction, Defendants are entitled to remove this action from state court under 28 U.S.C. §§ 1331, 1337, 1367, 1441 and 1446 to this Court, which is situated within the judicial district and division in which the action is now pending.

4. By virtue of the authority of Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987), and Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987), any and all claims that relate to an employee benefit plan are completely preempted by ERISA. Plaintiff's attempt to seek judicial interpretation and construction of her claims, which relate to an employee benefit plan in state court is, therefore, preempted.

5. Furthermore, Plaintiff is obligated pursuant to a written agreement to submit to arbitration any and all claims that she may have against her former employer, Silverleaf Club, as well as the named Defendant Silverleaf Resorts, Inc. Accordingly, Plaintiff's attempt to seek judicial interpretation and construction of her claims is preempted by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

6. This Notice of Removal is timely under Section 1446(b) of Title 28 of the United States Code because the Plaintiff's Citation and Original Petition and Request for Disclosure in this action were served on January 26, 2006. This Notice of Removal is filed within 30 days of service of Plaintiff's Citation and Original Petition and Request for Disclosure and is timely filed under 28 U.S.C. § 1446(b).

7. Written notice of the filing of this Notice will be given by counsel for Defendant to counsel for Plaintiff, as provided by law, and a copy of this Notice will be filed with the clerk of court in the District Court, 402nd Judicial District of Wood County, Texas.

WHEREFORE, Defendant respectfully

requests that this action be removed from the District Court, 402nd Judicial District of Wood County, Texas, to the United States District Court for the Eastern District Texas, Tyler Division and that this Court enter such further orders as may be necessary and appropriate.

Dated: 2-16-06 Respectfully submitted,

By: s/_____

Bruce J. Douglas
Texas Bar. 06039770
LARKIN HOFFMAN DALY & LINDGREN LTD.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
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Lead Attorney

AND

Dated: 2-17-06 By: s/_____

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ATTORNEYS FOR SILVERLEAF CLUB, AND

PLAN ADMINISTRATOR FOR SILVERLEAF CLUB EMPLOYEE INJURY BENEFIT PLAN, AND NAMED DEFENDANT SILVERLEAF RESORTS, INC.

OF COUNSEL:

Lawrence E. Ackels, Jr.
Texas Bar No. 00830100
ACKELS & ACKELS, L.L.P.
2777 Stemmons Freeway - Suite 879
Dallas, TX 75207
Telephone: (214) 267-8600
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ATTORNEYS FOR DEFENDANT SILVERLEAF RESORTS, INC.

CERTIFICATE OF SERVICE

I certify that, on February 17, 2006, I caused to be mailed a true and correct copy of the foregoing Notice of Removal by U.S. Mail, certified, return receipt requested to plaintiff's counsel of record at his last known address:

Rex A. Nichols, Jr., Esq.
Nichols & Nichols, P.C.
1703 Judson Road
P.O. Box 2623
Longview, TX 75601-2914

s/
Gregory S. Porter

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LE ANN MCATEER	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. 6:06CV68-MHS
SILVERLEAF RESORTS, INC.	§	
and SILVERLEAF CLUB	§	

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE IN AND FOR THE EASTERN DISTRICT OF TEXAS - TYLER DIVISION:

NOW COMES Plaintiff, Le Ann McAteer, and file this her First Amended Complaint complaining of Silverleaf Resorts, Inc. and Silverleaf Club, Defendants, and for causes of action would respectfully show this Honorable Court as follows:

1. Plaintiff is an individual residing in Upshur County, Texas.

2. Defendant, Silverleaf Resorts, Inc. is a corporate entity which has previously been served with process in this case. Accordingly, with respect to this one Defendant, no additional service of process is necessary.

3. Defendant, Silverleaf Club is a corporate entity which may be served with process by serving its registered agent at the following address:

Bob Levy
18270 Singing Wood Lane

Flint, Texas 75762

4. On or about July 11, 2005, Plaintiff sustained serious and disabling injuries (herniated disk(s)) while working at Defendants' facilities in Wood County, Texas. At the time of the subject incident, Plaintiff was employed by Defendants. Despite the profitability of Defendants' business, Defendants did not subscribe to workers compensation insurance for the benefit and protection of their employees.

4. On the day in question, Plaintiff was attempting to use a weedeater in and around a parking lot. Defendants had negligently installed the parking car stops with landscape timber nails. Because of this negligent installation, the parking lot stop was not stable causing Plaintiff to trip over the negligently installed landscaping timber nail and to fall on her back in such a manner that the weedeater lodged between the ground and her back. Subsequent diagnostic testing revealed a herniated disk at L4-L5 – the area that was impacted by the weedeater when Ms. McAteer fell. Dr. Jonathan Fontenot subsequently performed surgery at Longview Regional Hospital on Ms. McAteer. Even if this surgery is deemed to be successful, the injuries sustained as a result of the occurrence made the basis of this suit have been extremely painful and are likely to require expensive future care. Furthermore, these injuries are likely to have a significant impact on Ms. McAteer's future quality of life. It is believed that Ms. McAteer will have a significant degree of future impairment making it difficult if not impossible for her to earn a decent living considering the nature of her impairment, her educational

background, and prior work experience.

5. Plaintiff would further allege and assert that Defendants (and those acting in the course and scope of their employment for Defendants) were negligent in one or more of the following respects:

1. In failing to provide Plaintiff with a safe place to work in violation of its statutory duty to do so;

2. In failing to properly secure the parking lot car stop(s) such that they did not create a hazard to Plaintiff and others who were working or walking in close proximity to them;

3. In assigning Plaintiff to work with a weedeater in an area around the parking stops when Defendants knew, or should have known, that the means used to secure the parking lot car stops created a hazard for such employees;

4. In failing to warn Plaintiff and others of the hazard that was created by failing to properly secure the parking lot car stops; and

5. In failing to implement appropriate procedures for employee safety that would likely have prevented the occurrence in question from taking place.

Each of the foregoing acts of negligence, whether of commission or omission, and whether considered separately or collectively, constituted negligence and/or negligence *per se* and each was a proximate cause of the subject occurrence and of the injuries and damages for which recovery is sought herein. Plaintiff further invokes the doctrine of *respondent superior.*

6. Plaintiff's injuries and damages far exceed the minimum jurisdictional prerequisites of this Court. Plaintiff seeks recovery of all elements of damages, recognized by Texas law, to the extent appropriate under the circumstances in such amount or amounts as the jury may deem fair and reasonable after hearing the evidence at trial.

7. Plaintiff is further entitled to recover both pre-judgment and post-judgment interest at the maximum rate and to the maximum extent permitted by Texas law, together with such other and further remedies as are provided in or contemplated by Texas law.

8. The Court has previously ruled, over Plaintiff's objection, that all of Plaintiff's state law claims are pre-empted by ERISA. Plaintiff continues to respectfully disagree with the Court – otherwise the entire workers' compensation scheme in the State of Texas and in all other states is worthless. No "informed" employer will purchase workers' compensation insurance for the protection of itself and its' employees under these circumstances. Employers can and will establish ERISA "plans" to completely insulate themselves from all state common law responsibility for employee injuries, arising out of their negligence, while such plans have no effective guidelines establishing a minimum limit of mandatory benefits for injured employees.[1]

9. While continuing to respectfully disagree with the Court's decision, the undersigned, by way of

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[1] For example, can such plans pay 10 % of the claimant's medical expenses and 10% of their lost wages? Even less?

alternative pleading, has no alternative other than to assert claims for benefits pursuant to the ERISA plan. (Incidentally, Defendant has denied all claims for all plan benefits; Plaintiff has received nothing to compensate her for her medical expenses, lost income, or any other element of damage she has sustained to date).

9. Plaintiff further seeks the recovery of reasonable attorneys' fees at the rate of $200 per hour, which the undersigned alleges is a reasonable fee for such services in this locality and within the Eastern District of Texas.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that each Defendant be cited to appear and answer herein, and that upon final trial hereof, Plaintiff recover judgment against Defendants for all elements of damages to which she is entitled by virtue of Texas law, in such amounts as the jury may deem fair and reasonable after hearing the evidence at trial, court costs, pre-judgment and post-judgment interest at the highest rate and to the maximum extent permitted by law, and such other and further relief, at law or in equity, to which Plaintiff may show herself justly entitled to receive.

Respectfully submitted,
Law Offices of
NICHOLS & NICHOLS, P.C.
P.O. Box 2623
Longview, Texas 75606
(903) 757-2464
(903) 757-2287 (FAX)

BY: /s/Rex A. Nichols, Jr.

REX A. NICHOLS, JR.
State Bar No. 15006330

Karen Bishop
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(903) 843-3096 (FAX)

ATTORNEYS FOR PLAINTIFF,
LE ANN MCATEER

CERTIFICATE OF DELIVERY

This is to certify that a true and correct copy of the above and foregoing instrument has been mailed in compliance with the Federal Rules of Civil Procedure to Mr. Bruce J. Douglas, LARKIN, HOFFMAN, DALY & LINDGREN, LTD., 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Minneapolis, Minnesota 55431-1194 and Mr. Greg Porter, CLARK, LEA, AINSWORTH & PORTER, P.O. Box 98, Tyler, Texas 75702, attorneys of record for Defendant, Silverleaf Club, and Plan Administrator for Silverleaf Club Employee Injury Benefit Plan, and Named Defendant Silverleaf Resorts, Inc.

SIGNED this 11th day of August, 2006.

/s/Rex A. Nichols, Jr.
REX A. NICHOLS, JR.